DATE: October 14, 2005

TO: Jo Anne Barnhart, Commissioner
Social Security Administration

RE: Social Security Notice of Proposed Rulemaking 20 CFR 404,405, 416, and 422
Regulations Nos., 4, 5.16, and 22 Administrative Review Process for
Adjudicating Initial Disability Claims

On July 27, 2005, the Social Security Administration proposed changes on improving the disability process. The posting invited comments.

I have several comments that I would like to make about the proposed rules and pose several questions that do not appear to be addressed:

First - the proposed rules note that each adjudication component involved in the disability determination process will be able to work with claims by electronically accessing and retrieving information that is collected, produced and stored as part of an electronic disability file. **How soon will this be available at all components, including the Appeals Council?** I have heard that the experimental electronic folders seen at certain levels, especially those at the Appeals Council have consisted of no more than 60 to 100 pages. **When a claimant or a representative submits 1100 pages of VA medical records, like the paper file on my desk, how is anyone suppose to review that material on 17 or 19 inch monitor, especially if we are going to split screens on the same monitor?**

Second - It is mentioned that the Reviewing Officer should be an attorney because attorneys are ideally suited to perform certain critical reviewing official functions such as garnering the requisite evidence to compile a complete case record and drafting a well-supported legally sound decision. What makes anyone think attorneys are any better than those individuals who have spent years learning the disability program? You take an attorney, give him/her 3 weeks of training and he/she is suppose to know the program. I don't think so and I believe I have the proof of my statement. Administrative Law Judges are attorneys. They produce about 600,000 decisions (favorable and unfavorable) and/or dismissals a year. About 120,000 or 20% of the above number are currently appealed to the Appeals Council. The Council grants review on the average of 27% or 32,400 cases because of defects in the hearing decision or dismissal action. Of the remaining 87,600 cases about 20% (17,520 cases) file a civil action and, according to the proposed rules, 50% or 8,760 cases of those cases are remanded by the Court because of defects in the hearing decision. **So in effect, of the 120,000 unfavorable or partial favorable hearing decisions and/or dismissals appealed to the Appeals Council, 41,160 cases or approximately 33% of the ALJs unfavorable decisions/dismissals have significant defects or are in violation of the law and regulations**. Of course, this does not take into

consideration the numerous protests the Appeals Council receive from various effectuating components on the favorable ALJ decisions that are issued that have some type of significant defect. **So the question arises, do we really need attorneys who have had little or no experience in the disability programs as a Federal reviewing official or would it be better to have someone who is knowledgeable with the programs?** I would prefer to have someone who is knowledgeable with the programs.

Someone may ask the question: Why does the current Appeals Council let so many defects pass by? The answer is simple. At the lower levels of adjudication and before ALJs, determinations and decisions are to be based on the preponderance of evidence. However, at the AC level, only substantial evidence is required. This same criteria is also noted in the proposed regulations for the Decision Review Board. **What constitutes substantial evidence one may ask? One just needs to look to the Courts for their definition of substantial evidence: *"More than a scintilla and less than preponderance".* So why not make "preponderance" the criteria at all levels?**

Third - It is noted that the proposed regulations indicate that the Decision Review Board (DRB) is to be appointed by the Commissioner and will consist of administrative law judges and administrative appeals judges and the DRB members will have staggered terms and serve on a rotational basis. **First, how many DRBs will there be and where will they and their staff be located? What will happen to the current staff of paralegal specialists and support staff that currently work for the Appeals Council once it is eliminated?** I can see that administrative law judges that will serve on the DRB will then rotate back to the hearing office. **However, inasmuch as the Appeals Council would no longer exist, where will the administrative appeals judges rotate back too? If one of the administrative law judges sitting on the DRB is the same administrative law judge who issued the hearing decision, will that administrative law judge have to recluse himself/herself from reviewing the case? What if one or more of the administrative law judges sitting on the DRB are to review cases from their own offices? Shouldn't the administrative law judge(s) recluse him/her/themselves?** It is noted that the DRB is to consist of two Administrative Law Judges and one Administrative Appeals Judge. **If the DRB is to affirm, reverse, or remand, do you need an unanimous vote or a majority vote?** If only a majority vote, can the dissenting judge put his/her comments in the file or submit them to a higher authority for study?

Fourth - In studying the flowchart that the Commissioner put out regarding how this new process will work, it is noted that the Reviewing Officer can return the case to the initial level. **However, I see nothing in the flowchart showing that an Administrative Law Judge can remand a case to a Reviewing Officer or that the Decision Review Board can remand a case to an Administrative Law Judge or that a case can be remanded from the Court to either the Decision**

Review Board or directly to an Administrative Law Judge. The proposed regulations indicate that if a Court remands a case, it will go through the DRB.

Fifth - It is noted that proposed rule 405.30, Discrimination Complaints, indicates that if a claimant believes that an adjudicator has improperly discriminated against him/her, the individual may file a discrimination complaint with us (SSA). The individual must file any such complaint within 60 days of the date upon which the individual became aware that he/she may have been discriminated against. **However, the proposed rules do not state who will make the determination and/or decision on whether the claimant was or was not discriminated against. It would appear to me that someone, outside of the administrative disability process should make this decision. The proposed rules do not indicate what appeals, if any, the individual may file or if the individual may file a civil action once a determination/decision is made as to whether or not the individual was improperly discriminated against. The proposed rules do not state what actions can or will be taken against the adjudicator if discrimination is found. Also, what if a claimant alleges that he or she received an "unfair hearing" before an Administrative Law Judge?** An unfair hearing allegation is quite different from a discrimination complaint. **What actions can a claimant/representative take if they believe the claimant received an unfair hearing when their right to file an appeal no longer exists?**

Sixth - Proposed regulation 405.351, Closing Statement – indicates that an Administrative Law Judge may limit the time you may have to make a closing statement. **Are we talking about the oral closing statement at the hearing?** Since some of the ALJs already think of themselves as untouchable, responsible to no one and all knowing, isn't this going a little too far. After all, they are not Supreme Court justices. **I believe better wording would be some thing to the effect that "after the hearing, an ALJ may limit the time in which to submit a written closing statement. Such time limits shall be no less than 10 days after the close of the hearing."**

Seventh - Proposed regulation 20 CFR 405.371 states that the Notice that accompanies the Administrative Law Judge's decision will inform you (the claimant and/or representative) whether or not the decision is our final decision. If it is our final decision it will so state. If it is not our final decision, the notice will explain that the Decision Review Board has taken review of your claim. However, in proposed regulation 20 CFR 405.410(b)(1) it is indicated that the Board may use ***random*** sampling, the use of specific claim characteristics, a combination of these two methods, or other methods to select claims for review. **So this begs the question, how will the ALJs and/or HO staffs know when the hearing decision is being issued, that that particular case is being *randomly* selected for review by the Decision Review Board?** Wouldn't it be better that the Notice that accompanies the hearing decision indicate that "the ALJ's decision is the final decision of the Commissioner; however, if the case is

randomly selected for review by the Decision Review Board, you and your representative will be so advised by letter." If the case is randomly selected for review, a computer generated letter would then be sent to the claimant and representative advising them of such.. If the Decision Review Board then decides that the hearing decision is correct, a letter or an Affirmation Decision could be sent to the parties advising them that the DRB has decided not to disturb the hearing decision and that the DRB affirms the hearing decision and that it now stands as the final decision of the Commissioner.

Eighth - It is noted that the Commissioner has indicated that she intends to implement the the proposed changes gradually, region by region, and that she expects to begin the implementation process in one of the smaller regions and expanding to additional regions as experience is gained. The Commissioner states that "We believe that this will enable us to carefully and to quickly address any potential problems that may arise." **However, I believe it would be better to not start with a small region or a large region but rather with a middle size region. This way, when defects in the system are discovered they can be taken care of. In addition, this will also provide a better statistic analysis as to what impact the proposed changes will have on the District Courts.**

Ninth - The proposed regulations indicate that when a Federal court remands a disability case for further consideration, the Decision Review Board may make a decision based upon the evidence in the record or it may remand the case to an administrative law judge. If the Decision Review Board remands a case to an administrative law judge, it will send the claimant a notice. **How many signatures will be on that notice?** Also, the proposed regulations are silent as to what happens after the DRB remands the case and the ALJ holds a supplemental hearing and issues another unfavorable decision. **Will the notice from the ALJ advise the parties that they have a right to file exceptions? If yes, with whom? If no, does the case automatically go straight back to court if the Court issued a sentence 6 remand order? I assume that if the court had issued a sentence 4 remand and the case is not randomly selected for review by the DRB, the claimant will be forced to file another civil action?**

Tenth - **Has there been any thought to the possibility that a District Court Judge could sanction an Administrative Law Judge?** In the past, some District Court judges have required individuals within the Office of Hearings and Appeals to appear before them to explain why certain actions were taken or not taken or to explain why it took so long to get something done. The individuals selected to appear before the District Court Judge or Magistrate, were non-attorneys because some District Court Judges have indicated that they would impose sanctions. However, since the individuals being sent by OHA Central Office were non-attorneys, the District Court Judges were limited in what he/she could do. **So, the question arises, if a District Court Judge would sanction an Administrative Law Judge, would that be grounds for immediate removal?**

Eleventh - The proposed regulations note that "we propose to eliminate the right of claimants to appeal disability decisions to the Appeals Council only with respect to claims that have been adjudicated in those States where our proposed changes have been implemented. If your claim has not gone through the new process, you will retain the right to appeal according to our current rules. However, if your claim has gone through the new process, including review by a reviewing official, you will not be allowed to seek administrative of the administrative law judge decision". **What about those claimants that move from a State where the proposed changes have been implemented to a State where the proposed changes have not been implemented?** Example: proposed changes implemented in the State of Maryland. Claimant lives in Maryland and is denied at all levels, including by an Administrative Law Judge. However, shortly before the hearing decision is issued, the claimant moves to Texas where the proposed changes have not been implemented. **What rights does the claimant have? Can the claimant file a request for review with the Appeals Council or does the claimant have to file a civil action, which will be filed in a Texas Court?**

Twelfth - We, who work at OHA Central Office and specifically for the Appeals Council, are fully aware that no matter what is written about the proposed changes, the Commissioner has already made up her mind to implement. How do we know this? The answer is simple – we are losing people, paralegals and support staff personnel to retirement and changes in positions. The Agency has been told that is under a 2 year hiring freeze, implemented by the Commissioner. So, the original staff of about 325 paralegals is now down to slightly more than 250 (not counting the 20 or so who are on detail to other components) and all we are told is that must work harder to meet the numeric goals that were established. Well the request for review goals were established when we had sufficient number of individuals to do the work. Of course we do work other than requests for review. However, none of that work is counted for goal purposes. Now we don't have sufficient numbers but no one in the top level of management cares about that. Furthermore, when the Commissioner and the Associate Commissioner of OHA put forth their memos expressing their deep pride in what has been done with the electronic folders and the electronic control systems, you never see the Appeals Council mentioned. Why, because little to nothing is being done.

Thirteenth - From the very beginning of what has been put out by the Commissioner in her various talks, she has indicated that she and the President are concerned about why claimants are not receiving the "**right**" decision quicker. The **right** decision is not to find a claimant disabled and be put into pay status. The **right** decision is a decision based on the law and regulations and if that decision is unfavorable, it is still the **right** decision. To date, various writers, who are, obviously, individuals who have filed disability claims, have written to express their anger about being turned down or the length of time it has taken to get a response to their claim. Let me just say that just because an individual has an impairment that may preclude that person from doing his/her past relevant work, there may

be many more jobs in the national economy that the individual can perform based on his/her age, education, work experience, and residual functional capacity. As for the length of time is has taken, this problem could be resolved if the Agency would hire and train more people at all levels. If the Commissioner believes that the "**right**" decision is to put claimants into pay status immediately, then I suggest the abolishment of the recon level, the ALJ level and the AC level. When a claimant comes into a district office to file for disability all the claims representative has to do is make sure the claimant is still insured for title II purposes; ask the claimant if he/she is currently working (of course the answer will be 'no'); accept a note from a doctor indicating that the claimant is 'disabled' (don't worry about obtaining objective medical evidence to support the doctor's statement) and then ask the claimant to which institution does he/she want the first check sent too. Just look at all the money that would be saved by doing away with recon, the ALJs and the AC, not to mention their respective support staffs and the cost of leasing numerous buildings throughout the Nation. A bonus to this would be that the claimants would not need an attorney and the claimant would get all of the benefits and would not have to worry about paying an attorney for anything. Also, I cannot close until I comment on letters from different individuals who identify themselves as ALJs or in one case a Chief ALJ. Please people, the Commissioner does not make the law that states that a claimant must be disabled for 12 continuous months. Congress makes the laws and it is Congress who has stated that a decision has to be make as to whether the claimant is totally disabled. Those who recommended a finding of 'partial' disability, based on a percentage, should address those concerns to Congress and the President. If the individuals who wrote those letters are actual ALJs or a Chief ALJs, well obviously they don't know the disability program as well as they thought.

The bottom line is that the Appeals Council does a great job and has done a great job for many years. It is time, however, to have people to be put in charge who are committed to making sure the **right** decision is made for all claimants whether that means putting a claimant on the disability rolls or finding the claimant not disabled. In addition, it is time to increase the staff (both paralegals and support staff). Paralegals go through 6 weeks of training and really don't become fully trained for some 2 years of being on the job. It is also time when problems, such as when a claimant is still in pay status after a hearing decision finds the claimant no longer disabled, that there be some system to get the claimant's benefits stopped. When you ask management about problems such as this, you are told there is a mechanism in place but only at the ALJ level. However, if the mechanism was by-passed or forgotten by the ALJs, then the AC needs a mechanism in place. The amount of money that is continually paid to individuals who are no longer disabled is staggering.

I would also like to close by noting that several years ago, Ruling were published which are commonly referred to as the PUTT Rulings. These Rulings were to help with process unification at all levels of the administrative process. Unfortunately, at the initial and reconsideration levels, these Rulings were, for the most part, never properly used. At the hearing and appeals council levels training was conducted on these Rulings. However, sometimes you can't teach an old dog

new tricks and many administrative law judges did not use the Ruling and interpreted them differently from written instructions that were provided. However, the PUTT Rulings were very good. Unfortunately, in an effort to get the backlog of cases out at the hearing level, a decision was made for the administrative law judges to issue favorable "bench" decisions. Unfortunately, these "bench" decisions do not comply with the requirements set forth in the PUTT Rulings and while these decisions initially get the backlog down, come time for continuing disability review (CDR), the next adjudicators will have little to use in order to determine the basis of the favorable decision and/or whether medical improvement has been shown. All determinations and decisions, whether unfavorable, partially favorable and fully favorable, should comply with the law and regulations and short cuts should never be taken.

I thank you for your time.

A dedicated civil servant